

**DOCKET**

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VERSUS United States

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| DATE        | NOTE   | PROCEEDINGS & ORDERS |
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| May 2 1988  | Petition for writ of certiorari filed.   |                      |
| Jun 1 1988  | Order extending time to file response to petition until July 2, 1988.  |                      |
| Jun 28 1988 | Order further extending time to file response to petition until July 28, 1988.                               |                      |
| Jul 28 1988 | Brief of respondent United States in opposition filed.   |                      |
| Aug 3 1988  | DISTRIBUTED, September 26, 1988  |                      |
| Sep 20 1988 | REDISTRIBUTED, October 7, 1988   |                      |
| Oct 11 1988 | Petition DENIED. Dissenting opinion by Justice Blackmun with whom Justice O'Connor joins. (Deleted opinion.) |                      |

Continued

**PETITION  
FOR WRIT OF  
CERTIORARI**

87-1800

No.

Supreme Court, U.S.

FILED

MAY 2 1988

JOSEPH F. SPANIOLO, JR.  
CLERK

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in the

Supreme Court of the United States

OCTOBER TERM 1987

NEIL ROBERTSON, executor of the will of NORA HAND  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

Robert L. Perry, Jr., Esquire  
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## QUESTIONS PRESENTED

Decedent devised and bequeathed some 53 acres of land, \$5,000.00 and one half the residue of her estate to trustees with the land to be used for a non-profit, public cemetery and the funds to be used to maintain that cemetery. The trustees resolved not to charge for burial space and to institute charges only if it appeared that the income from the corpus would not adequately maintain the cemetery. The Internal Revenue Service (the "Service") denied an estate tax charitable deduction for the devise and bequest under Section 2055 (a) (3) of the Internal Revenue Code.

1. Is a non-profit, public cemetery, organized for charitable purposes in the common-law sense, also "charitable" for the purposes of Section 2055 (a) (3)?

## PARTIES

All parties are listed in the caption.

## TABLE OF CONTENTS

|  |     |
|--|-----|
| Questions Presented . . . . .  | i   |
| Parties . . . . .  | ii  |
| Table of Contents . . . . .  | iii |
| Table of Authorities . . . . .   | iv  |
| Opinions Below . . . . .   | 1   |
| Jurisdiction . . . . .   | 1   |
| Statutory Provisions . . . . .   | 1   |
| Statement of Facts . . . . .   | 3   |
| Argument . . . . .   | 4   |
| Statutory Construction . . . . .   | 6   |
| Appendix A (Order affirming judgment of . . . . .<br>United States District Court<br>for the Middle District of Tennessee) | 1a  |
| Appendix B (Memorandum and Order of . . . . .<br>District Court)   | 1b  |

## TABLE OF AUTHORITIES

| CASES  | PAGE: |
|--|-------|
| <i>Bank of Carthage v. United States</i> ,<br>304 F.Supp. 77 (W.D. Mo. 1969) . . . . .                                   | 5     |
| <i>Bob Jones University v. United States</i> ,<br>461 U.S.574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) . .                 | 6     |
| <i>Bushong v. Taylor</i> ,<br>161 Tenn. 522, 33 S.W. 2d 80 (1930) . . . . .  | 6     |
| <i>Chapman v. Newell</i> ,<br>146 Iowa 415, 125 N.W. 324 (1910). . . . .   | 6     |
| <i>Child v. United States</i> ,<br>540 F 2d 579 (2nd Cir., 1976),<br><i>cert. denied</i> , 429 U.S. 1029 (1977). . . . . | 5     |
| <i>Corin v. Glenwood Cemetery (N.J.)</i> ,<br>69A 1083 (1908) . . . . .  | 6     |
| <i>Craig v. Commissioner</i> ,<br>11 B.T.A. 193 (1928) . . . . .   | 5     |
| <i>Davie v. Rochester Cemetery Association</i> ,<br>91 N.H. 494, 23A2d 377 (1941) . . . . .                              | 6     |
| <i>Estate of Edwards</i><br>88 Cal. App. 3rd 383, 151 Cal. Rptr 770 (1979). . . .  | 6, 8  |

|  |         |
|--|---------|
| <i>First National Bank of Omaha v. United States</i> ,<br>681 F2d 534 (8th Cir., 1982),<br><i>cert. denied</i> , 459 U.S. 1104 (1983). . . . .                                   | 5       |
| <i>Gund's Estate v. Commissioner</i> ,<br>113 F2d 61 (6th Cir., 1940),<br><i>cert. denied</i> , 311 U.S. 696 (1940). . . . .   | 5       |
| <i>Hopkins v. Grimshaw</i> ,<br>165 U.S. 342, 17 S. Ct. 401, 41 L. Ed. 739 (1896). . . .   | 6       |
| <i>Johnson v. Holifield</i> ,<br>79 Ala. 423, 158 Am. Rep. 596 (1885). . . . .   | 6       |
| <i>McElwain v. Attorney General</i><br>241 Mass 112, 134 N.E. 620 (1922). . . . .  | 6       |
| <i>Mellon Bank v. United States</i> ,<br>590 F.Supp. 160 (W.D.Pa., 1984); reversed at<br>762 F2d 283 (3rd Cir., 1985); ( <i>cert. denied</i> )<br>475 U.S. 1032, (1986). . . . . | 5, 7, 8 |
| <i>Newton v. Newton Burial Park</i> ,<br>326 Mo. 901, 34 S.W.2d 118 (1930). . . . .  | 6       |
| <i>Stubblefield v. People's Bank</i> ,<br>406 Ill. 374, 94 N.E. 2d 127 (1951) . . . . .  | 6       |
| <i>Wilber National Bank V. Commissioner</i> ,<br>17 B.T.A. 654 (1929) . . . . .  | 5       |

## STATUTES

|                                      |         |
|--------------------------------------|---------|
| 26 U.S.C. Section 170 (c) (5) .....  | 7       |
| 26 U.S.C. Section 501 (c) (3) .....  | 6, 7    |
| 26 U.S.C. Section 501 (c) (13) ..... | 7       |
| 26 U.S.C. Section 2055 (a) (2) ..... | 7       |
| 26 U.S.C. Section 2055 (a) (3) ..... | i, 3, 7 |
| 28 U.S.C. Section 1254 (1) .....     | 1       |
| 28 U.S.C. Section 1291 .....         | 3       |
| 28 U.S.C. Section 1346 .....         | 3       |

## REGULATIONS

|                                      |   |
|--------------------------------------|---|
| Reg. 1.501 (c) (3) (1) (d) (2) ..... | 6 |
|--------------------------------------|---|

## TREATISES, RESTATEMENTS AND ANNOTATIONS

|   |   |
|---|---|
| Bogert, <i>Trusts and Trustees</i> , (1935), Section 377, p. 1195 ... | 6 |
| <i>Restatement of the Law of Trusts</i> , 2d, Section 374 .....       | 6 |
| <i>Scott on Trusts</i> , 3rd Edition,<br>Section 124.2, p. 948 .....  | 6 |

## SOLICITOR'S OPINION

|   |   |
|---|---|
| Sol. Op. 159 III-IC.B. 480 (1924) ..... | 6 |
|---|---|

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit does not have an official citation. (An order was issued without written opinion.) A copy of the order is Appendix A.

The opinion of the United States District Court for the Middle District of Tennessee is not reported officially. It is reported unofficially at 87-1 U.S.T.C. par. 13,712 (1987). A copy of the opinion is Appendix B.

## JURISDICTION

The order of the Court of Appeals for the Sixth Circuit was entered on February 11th, 1988. This Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC Section 1254 (1).

## STATUTORY PROVISIONS

United States Code, Title 26 (Internal Revenue Code of 1954 as amended)

Section 2055. Transfer for Public, Charitable, and Religious Uses.

“(a) In General—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers—...



...(3) to a trustee, or trustees, or a fraternal society order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals, such trust, fraternal society, order, or association would not be disqualified for tax exemption under section 501 (c) (3) by reason of attempting to influence legislation, and such trustee or trustees or such fraternal society, order, or association, does not participate in or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."...

## STATEMENT OF THE FACTS

The will of Nora Hand was probated in the County Court of Cheatham County, Tennessee, on March 3rd, 1979, and Neil Robertson was appointed its executor. With detailed provisions in her will (Items VII, VIII, IX and XVI) Miss Hand left 53 acres of land to certain trustees to be used as a public cemetery and then \$5,000 and one-half of the residue of her estate to those same trustees to hold and use only the income for the perpetual care of an existing public cemetery (N.P. Hagewood Cemetery) and for the 53 acres tract as it developed as a cemetery. (R. 7a) The trustees are further to manage that cemetery. The trustees adopted a resolution at their January 12th, 1981, meeting "to provide burial space to the general public at no charge so long as the income from the said perpetual care fund shall appear sufficient to adequately maintain said cemetery, and that should any charge ever be imposed for such burial space that it shall be only in an amount that when added to the corpus of said fund will provide an adequate income for the perpetual care of said cemetery." (R.7a)

The Executor filed his estate tax return and deducted these bequests and devise as being charitable under 26 U.S.C. 2055 (a) (3), resulting in no tax liability to the estate. The Defendant, United States of America, contending these bequests and devise were not charitable, assessed, and the Plaintiff paid under protest, \$25,929.93 in estate tax, penalty, and interest. A claim for refund seeking the full amount paid plus interest was filed and no action taken within six months. Accordingly, the instant suit was filed on February 15th, 1982, likewise seeking a refund of \$25,929.93 plus interest.<sup>1</sup>

<sup>1</sup>The District Court had jurisdiction over this case pursuant to 28 U.S.C. Section 1346. Petitioner's appeal to the Sixth Circuit was based on 28 U.S.C. Section 1291.

Each party filed a motion for summary judgment and the case was heard on stipulations of fact. By memorandum and order entered January 29th, 1987, the motion filed by Plaintiff, Neil Robertson, executor of the will of Nora Hand, was denied and the motion filed by the Defendant, United State of America was granted. Appendix B. The Executor appealed to the Court of Appeals for the Sixth Circuit. (R.15) The Sixth Circuit affirmed the judgment of the District Court. Appendix A.

The N.P. Hagewood Cemetery is a public cemetery, practically surrounded by the 53 acres, more or less, tract of land devised to the Trustees for further cemetery purposes. The N.P. Hagewood Cemetery is an approximately one-half acre cemetery at least 107 years old. Some 100 people are buried there. It has been maintained over the years by private donations. The N.P. Hagewood Cemetery is not affiliated with any church or other religious organization. The N.P. Hagewood Cemetery offers burial space to individuals regardless of their financial situation. (R.7a)

## ARGUMENT

This Petition for Certiorari is filed on behalf of the estate of Nora Hand which is aggrieved by the position of the Internal Revenue Service and by judicial decisions holding that when Congress used the term "charitable" it did not mean "charitable", at least where an estate tax deduction for non-profit, public cemeteries is concerned.

Through at least sixty years, a lengthening line of cases has consistently held that non-profit, public cemeteries are not entitled to an estate tax charitable deduction.<sup>2</sup> Most recently, this Honorable Court denied the writ of certiorari with three justices dissenting.<sup>3</sup> On one hand, the length of that line suggests a settled issue. On the other hand, it suggests the victims' overwhelming disbelief that the Courts will persist in construing a straightforward statute in such an unfair, inequitable, and illogical fashion. Petitioner has filed this petition with the belief that the applications of this Honorable Court's learning and wisdom to the construction of the statute in question will remedy a manifest injustice which one Circuit judge has viewed to be of Constitutional dimension.<sup>4</sup>

Common observation indicates that dignified interment of human remains is something which our culture views as important and necessary. Non-profit public cemeteries provide the site for interment and maintenance of that site for this necessity. Obviously, tax incentives encourage and make possible the provision of this necessity by such organizations. For many of such organizations, their financial well-being and even survival, may well depend on such incentives.

<sup>2</sup>*Craig v. Commissioner*, 11 B.T.A. 193 (1928); *Wilber National Bank v. Commissioner*, 17 B.T.A. 654 (1929); *Gund's Estate v. Commissioner*, 113 F.2d 61 (6th Cir. 1940), cert. denied, 311 U.S. 696 (1940); *Bank of Carthage v. U.S.*, 304 F. Supp. 77 (W.D. Mo. 1969); *Child v. U.S.*, 540 F.2d 579 (2nd Cir. 1976) cert. denied, 429 U.S. 1029 (1977); *First National Bank of Omaha v. U.S.*, 681 F.2d 554 (8th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); *Mellon Bank v. U.S.* 762 F.2d 283 (3rd Cir. 1985), cert. denied, 475 U.S. 1032, (1986).

<sup>3</sup>*Mellon Bank v. U.S.*, 475 U.S. 1032, (1986).

<sup>4</sup>Dissent of Judge Anderson in *Child v. U.S.*, 540 F.2d 579 (2nd Cir. 1976).

A proper construction of the statute in question by this Court will provide the incentive for testators to provide the land and funds to provide this necessity inevitable for us all.

### STATUTORY CONSTRUCTION

In a vast body of American jurisprudence<sup>5</sup> only in the context of estate tax deductions for non-profit, public cemeteries are such organizations not "charitable". Even the regulations under the similar provisions of 26 USC 501 (c) (3)<sup>6</sup> adopt the common law definition of "charitable", which certainly would include non-profit, public cemeteries.

In *Bob Jones University v. United States*, 461 U.S. 574 (1983), this Honorable Court shed substantial light on the definition of "charitable". Though an income tax case, this Court even relied on estate tax authority,<sup>7</sup> in concluding that Congress was speaking of certain common law standards of

<sup>5</sup>*Hopkins v. Grimshaw*, 165 U.S. 342, 352 (1896); *Johnson v. Holifield*, 79 Ala. 423, 158 Am. Rep. 596 (1885); *Estate of Edwards* 88 Cal. App. 3rd 383, 151 Cal. Rptr. 770 (1979); *Stubblefield v. People's Bank*, 406 Ill. 374, 94 N.E. 2d 127 (1951); *Chapman v. Newell*, 146 Iowa 415, 125 N.W. 324 (1910); *McElwain v. Attorney General*, 241 Mass. 112, 134 N.E. 620 (1922); *Newton v. Newton Burial Park*, 326 Mo. 901, 34 SW 2d 118 (1930); *Davie v. Rochester Cemetery Association* 91 N.Y. 494, 23A 2d 377 (1941); *Corin v. Glenwood Cemetery* (N.J.) 69A 1083 (1908); *Bushong v. Taylor*, 161 Tenn. 522, 33 SW 2d 80 (1930); *Restatement of the Law of Trusts* 2d, Section 374, Comment (h); *Scott on Trusts*, 3rd Edition, Section 124.2, p. 948; *Bogert, Trusts and Trustees*, (1935) Section 377, p. 1195.

<sup>6</sup>Reg. Sec. 1.501 (c) (3) (1) (d) (2)

<sup>7</sup>Sol. Op. 159 III- 1 C.B. 480 (1924)

charity when it used the term "charitable." Non-profit, public cemeteries including the N.P. Hagedwood cemetery relieve the public fisc, maintain public records, promote health, and combat community deterioration, which submittedly place them within the common law definition of "charitable."

In this case the District Court and consequently the Sixth Circuit followed the reasoning adopted by the Third Circuit in *Mellon Bank v. United States* 762 F2d 283 (3rd, Cir. 1985). In that case the Court concluded that because Congress in 1913 had enacted a provision for income tax exemption under 26 U.S.C. 501 (c) (3), and in 1954 had specifically enacted a provision for deductible contributions for cemeteries under the income tax provisions of 26 U.S.C. 170 (c) (5), it must have thought such cemeteries were not within the general definition of "charitable". Therefore, such cemeteries were not "charitable" within the meaning of 2055 (a) (2).<sup>8</sup>

Justice O'Connor, joined by Justice Blackman and Justice Powell in dissenting from the denial of the writ of certiorari in *Mellon Bank* wrote

This reasoning is far from inevitable. That Congress explicitly provided for nonprofit cemetery associations in 501 (c) (13) and 170 (c) (5) does not lead inescapably to the conclusion that many such associations are not within the more general exemption for "charitable" corporations. Some family cemetery corporations, for example, are covered by 501 (c) (13) but almost certainly would not qualify as "charitable" within the more general language of 501 (c) (3). See John D. Rockefeller

<sup>8</sup>Within the facts of this case it is believed that no significant distinction exists between the application of 2055 (a) (2) and 2055 (a) (3).

Family Cemetery Corp. v. Commissioner, 63 TC 355 (1974). Congress clearly intended to confer on these private cemetery associations an exemption from federal income taxation. *Id.* The nearly identical language of 170 (c) (5) suggests that Congress also intended that contributions to such associations be tax deductible. But it does not inevitably follow that public organizations that already qualified as "charitable" suddenly ceased to be so by virtue of a decision to afford a tax benefit to some organizations that could not meet this more restrictive requirement. This construction is especially unlikely in light of the virtually uniform consensus under state common and statutory law that nonprofit, public cemetery associations are "charitable" and that bequests to such organizations are therefore exempt from inheritance taxes. See, e.g. *In re Estate of Edwards*, 88 Cal App 3d 383, 151 Cal Rptr 770 (1979). See also Restatement (Second) of Trusts 374, Comment h (1959).<sup>9</sup>

Petitioner's argument cannot be expressed more logically or succinctly.

Only this Court's grant of the writ of *certiorari* can place this class of "charitable" organizations within the estate tax charitable deduction.

Even if this Honorable Court should ultimately adopt the Third Circuit's view on this issue, future disbelieving ex-

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<sup>9</sup>*Mellon Bank v. U.S.* 475 U.S. 1032, (1986)

ecutors and benefactors deserve its authoritative and ultimate resolution by this Court.

Respectfully submitted,

BALTHROP AND PERRY,  
An Association of Attorneys

By \_\_\_\_\_  
Robert L. Perry, Jr.,  
Counsel for Petitioner



1a

APPENDIX A

No. 87-5375

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

NEIL ROBERTSON, EXECUTOR OF THE )  
WILL OF NORA HAND, )

Plaintiff-Appellant, )

vs. )

ORDER

UNITED STATES OF AMERICA, )

Defendant-Appellee, )

Before: JONES, MILBURN, CIRCUIT JUDGES; and  
JOINER, Senior District Judge\*

This cause having come to be heard upon the record, the  
briefs and the oral argument of the parties, and upon due con-  
sideration thereof,

It is ORDERED that the judgment of the district court be,  
and it hereby is, affirmed upon the opinion of the district  
court.

ENTERED BY ORDER OF THE COURT

...../s/ JOHN P. HEHMAN.....

Clerk

\*The Honorable Charles W. Joiner, Senior U.S. District Judge for the  
Eastern District of Michigan, sitting by designation.

1b

## APPENDIX B

### IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

NEIL ROBERTSON, Executor of )  
the will of Nora Hand )  
VS. ) DOCKET  
NO. 3-82-0052  
UNITED STATES OF AMERICA )

## MEMORANDUM

Pending before the Court are motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, made by plaintiff Neil Robertson, Executor of the Will of Nora Hand, and by defendant United States of America. Oral argument was heard on this matter on December 20, 1984. The Court, after reviewing the pleadings submitted on these motions, and for the reasons stated herewith, DENIES plaintiff Robertson's motion and GRANTS defendant United States of America's motion for summary judgment.

The issue before the Court is a simple one: whether there is a genuine issue as to any material fact concerning the deductibility, for estate tax purposes, of a charitable donation to a nonprofit public cemetery if the bequests to the trustees of such charity plan to hold and use the income only for the per-

2b

petual care and maintenance of the cemetery. The plaintiff claims the charitable deduction pursuant to 26 U.S.C. § 2055 (a) (3) (1979).

Although this question has been the source of much controversy, a recent Third Circuit decision is almost directly on point. There the issue before the court was whether a bequest to a nonprofit cemetery was deductible for estate tax purposes as a bequest to an organization operating "exclusively for charitable purposes" under § 2055 (a) (2), *Mellon Bank v. United States*, 762 F.2d 283 (3rd Cir. 1985). Section 2055 (a) (2) is essentially identical to § 2055 (a) (3) and differs mainly in that (a) (3) is used when a trustee or association disburses the bequest while (a) (2) is used when there is a direct bequest to the intended beneficiary.

The district court in the *Mellon* decision held that the bequest to the cemetery qualified as a gift to a "corporation organized and operated exclusively for ... charitable ... purposes" and, thus, qualified for a deduction under § 2055 (a) (2). In deciding the issue, the district court remarked that it recognized "that the weight of authority as expressed in prior tax court and reviewing court decisions favor [ed] the [government's] position." *Mellon Bank v. United States*, 590 F. Supp. 160, 162 (W.D. Pa. 1984). It was in light of this confusion that this Court set oral argument on the issue with an instruction that both sides address the *Mellon Bank* district court decision. However, subsequent to the oral argument, the Third Circuit reversed the lower *Mellon* decision and held the contribution to be nondeductible. The court reasoned that the estate tax provision dealing with deductions to "charitable" organizations, in contrast to the legislative treatment of cemetery companies for income tax purposes, never specifically extended its coverage to encompass cemetery companies. The Court concluded, consequently, that it was

3b

"implausible to construe § 2055 (a) (2) to cover a situation which required an amendment to an almost identical parallel provision in the income tax sections to reach that result." *Mellon*, 762 F.2d at 285. The Court is cognizent that the result reached through application of this logic works to dull the luster of charitable giving and that there is an absence of any public policy justification for the distinction drawn between the treatment of such a gift for estate and income tax purposes. The Court, however, must conclude, as did the Third Circuit, that whether this result "was intentional or an oversight, it is not for us to amend the statutory language to provide for deductions for bequests to nonprofit cemetery associations when Congress has failed to do so." *Id.* at 286.

Accordingly, the motion for summary judgment made by the plaintiff Neil Robertson is DENIED and the motion made by the defendant United States of America is GRANTED. An Order will be entered in accordance with this Memorandum.

This the 29th day of January, 1987.

/s/ John T. Nixon  
UNITED STATES DISTRICT JUDGE

4b

**IN THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION**

|                             |   |               |
|-----------------------------|---|---------------|
| NEIL ROBERTSON, Executor of | ) |               |
| the Will of Nora Hand       | ) |               |
| VS.                         | ) | DOCKET        |
|                             | ) | NO. 3-82-0052 |
| UNITED STATES OF AMERICA    | ) |               |

**ORDER**

For the reasons discussed in the contemporaneously entered Memorandum, the Court hereby DENIES the motion for summary judgment made by plaintiff, Neil Robertson, executor of the Will of Nora Hand and GRANTS the motion for summary judgement made by the defendant, United States of America.

Entered this the 29th day of January, 1987.

/s/ John T. Nixon  
UNITED STATES DISTRICT JUDGE

# **OPPOSITION BRIEF**



(2)

No. 87-1800

Supreme Court, U.S.

FILED

JUL 28 1988

JOSEPH P. SPANIOLO, JR.  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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NEIL ROBERTSON, EXECUTOR OF THE WILL OF NORA HAND,  
PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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CHARLES FRIED  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

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# TABLE OF AUTHORITIES

| Cases:  | Page       |
|---|------------|
| <i>Child v. United States</i> , 540 F.2d 579 (2d Cir. 1976), cert. denied, 429 U.S. 1092 (1977) .....             | 3          |
| <i>Craig v. Commissioner</i> , 11 B.T.A. 193 (1928) .....   | 4, 6       |
| <i>First Nat'l Bank v. United States</i> , 681 F.2d 534 (8th Cir. 1982), cert. denied, 459 U.S. 1104 (1983) ..... | 3          |
| <i>Gund's Estate v. Commissioner</i> , 113 F.2d 61 (6th Cir. 1940), cert. denied, 311 U.S. 696 (1940) .....       | 6          |
| <i>Mellon Bank v. United States</i> , 762 F.2d 283 (3d Cir. 1985), cert. denied, 475 U.S. 1032 (1986) .....       | 2, 3, 4, 5 |
| <i>Schuster v. Nichols</i> , 20 F.2d 179 (D. Mass. 1927) .....  | 4          |
| <i>Wilber Nat'l Bank v. Commissioner</i> , 17 B.T.A. 654 (1929) .....   | 6          |
| Statutes:   |            |
| Internal Revenue Code of 1954 (26 U.S.C.):  |            |
| § 170(c)(2) .....   | 5          |
| § 170(c)(2)(B) .....  | 4, 5       |
| § 170(c)(5) .....   | 4, 5       |
| § 501(c)(3) .....   | 4          |
| § 501(c)(13) .....  | 4          |
| § 2055 .....  | 5          |
| § 2055(a) .....   | 2          |
| § 2055(a)(2) .....  | 2          |
| § 2055(a)(3) .....  | 1, 3       |
| Miscellaneous:  |            |
| S. Rep. 1622, 83d Cong., 2d Sess. (1954) .....  | 4-5        |

**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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No. 87-1800

NEIL ROBERTSON, EXECUTOR OF THE WILL OF NORA HAND,  
PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT*

---

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

Petitioner contends that the estate is entitled to an estate tax deduction under Section 2055(a)(3) of the Internal Revenue Code<sup>1</sup> for a transfer made in trust for the benefit of a nonprofit cemetery association.

1. Petitioner is the executor of the estate of Nora Hand, who died on February 25, 1979. The decedent made a substantial bequest—53 acres of land in Cheatham County, Tennessee, \$10,000 in cash, and one-half of the residue of her estate—to three trustees to be held in trust for use in the operation of the N.P. Hagewood Cemetery, a one-half-acre public cemetery that had been in existence for more than 100 years. The will specified that the be-

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

queathed real property was "to be used in connection with [the Hagewood] cemetery for graveyard or cemetery purposes for the general public" and that the cash bequest was to be used for "the upkeep, maintenance and improvement" of the cemetery. The will also directed the trustees to change the name of the cemetery to the "Hagewood-Hand Cemetery." On its federal estate tax return, the estate claimed a charitable contribution deduction for these bequests to the cemetery trustees. Subsequently, the trustees of the cemetery adopted a resolution to provide burial space to the general public at no charge so long as the income from a perpetual care fund was sufficient "to adequately maintain" the cemetery. See Pet. 3-4; C.A. App. 5-8, 16-22; Exhs. A, B.<sup>2</sup>

The Internal Revenue Service disallowed the deduction on the ground that nonprofit cemetery associations are not operated "exclusively for \* \* \* charitable \* \* \* purposes" within the meaning of Section 2055(a) of the Code, and it determined an estate tax deficiency of \$21,145. Petitioner paid the disputed taxes, plus interest and additions to tax, and filed an administrative claim for refund, which was not granted. Petitioner then brought this refund suit in the United States District Court for the Middle District of Tennessee, maintaining that the bequest to the cemetery trustees was eligible for the charitable deduction.

The district court granted the government's motion for summary judgment (Pet. App. 1b-3b). The court relied on *Mellon Bank v. United States*, 762 F.2d 283 (3d Cir. 1985), cert. denied, 475 U.S. 1032 (1986), which had rejected the same contention made by petitioner here. The *Mellon Bank* decision had explained that nonprofit cemetery companies had always been treated separately from other

<sup>2</sup> Petitioner recites that the cash bequest was \$5,000, but the will provides for a \$10,000 bequest.

"charitable" organization for federal tax purposes. Congress had specifically acted to extend the charitable income tax deduction to contributions made to cemetery companies, but it had not taken similar action with respect to the estate tax. See 762 F.2d at 285. The district court cited with approval the Third Circuit's conclusion that it would be "implausible to construe § 2055(a)(2) to cover a situation which required an amendment to an almost identical parallel provision in the income tax sections to reach that result" (Pet. App. 3b (quoting 762 F.2d at 285)). Accordingly, while questioning the wisdom of the rule established by Congress, the district court concluded that "it is not for us to amend the statutory language to provide for deductions for bequests to nonprofit cemetery associations when Congress has failed to do so" (Pet. App. 3b (quoting 762 F.2d at 286)). The court of appeals affirmed "upon the opinion of the district court" (Pet. App. 1a).

2. Petitioner contends that a nonprofit, public cemetery is an organization operated exclusively for "charitable \* \* \* purposes" within the meaning of Section 2055(a)(2) and (3) of the Code. As petitioner acknowledges (Pet. 5), this is a "settled issue." The courts of appeals have repeatedly held that the Code does not provide an estate tax deduction for contributions made to nonprofit cemetery companies because such companies do not fall under the umbrella of organizations generally described in Section 2055(a), and this Court has consistently declined to review challenges to those decisions. See, e.g., *Mellon Bank v. United States*, *supra*; *First Nat'l Bank v. United States*, 681 F.2d 534 (8th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); *Child v. United States*, 540 F.2d 579, 581-582 (2d Cir. 1976), cert. denied, 429 U.S. 1092 (1977). Congress has taken no action to change the relevant statutory provisions since certiorari was denied in



these cases, even though the logic of the distinction drawn in the Code has been criticized as "anomalous" (see *Mellon Bank v. United States*, 475 U.S. at 1034 (O'Connor, J., dissenting from denial of certiorari)), nor has any court departed from this settled body of law. Accordingly, there is no more reason for this Court to grant certiorari here than there was on the other occasions when the question was presented to it for review.

The decision below is correct for reasons well stated by the court of appeals in *Mellon Bank*, 762 F.2d at 285-286. From their earliest days, the federal tax statutes have always distinguished between cemetery companies and other organizations generally classified as "charitable." In the words of the Board of Tax Appeals, "Congress has consistently and persistently placed charitable and religious institutions in one class and cemeteries not operated for gain in a distinct and separate class" (*Craig v. Commissioner*, 11 B.T.A. 193, 200 (1928)). See also *Schuster v. Nichols*, 20 F.2d 179, 181 (D. Mass. 1927). Thus, in the present Code, Section 501(c)(3) provides a tax exemption for "charitable" organizations, but tax-exempt status is conferred upon cemetery companies by a separate provision, Section 501(c)(13).

Significantly, Congress addressed itself to this distinct treatment when it enacted the 1954 Code. At that time, in addition to the general provision permitting an income tax deduction for contributions to charitable organizations (I.R.C. § 170(c)(2)(B)), Congress enacted a special provision (I.R.C. § 170(c)(5)) establishing a deduction for contributions to nonprofit cemetery companies. The Senate Report explained that this amendment "extends the deduction for charitable contributions beyond those allowed under present law to contributions made to nonprofit cemetery and burial companies." S. Rep. 1622, 83d Cong.,

2d Sess. 30 (1954)). Clearly, since Section 170(c)(2) does not confer upon a taxpayer an income tax deduction for contributions to cemetery companies, the "almost identical parallel provision" covering estate tax deductions, Section 2055, cannot plausibly be read to allow a deduction for a contribution to a cemetery company. *Mellon Bank*, 762 F.2d at 285. Because Congress, in contrast to its action with respect to the income tax, did not see fit to create an estate tax deduction for contributions to cemetery companies in 1954 or at any time thereafter, it "is not for [the courts] to amend the statutory language to provide for deductions for bequests to nonprofit cemetery associations when Congress has failed to do so" (*id.* at 286 (footnote omitted)).

Petitioner argues that the intent of Congress when it enacted Section 170(c)(5) was much narrower than that ascribed to it by the court in *Mellon Bank* — namely, that Congress acted only to extend the charitable deduction to a class of cemetery companies that clearly were not "charitable," such as family cemetery corporations, but that the enactment of Section 170(c)(5) is not inconsistent with the proposition that other, nonfamily, cemetery companies should be regarded as "charitable" organizations within the meaning of Section 170(c)(2)(B) and, hence, Section 2055. See Pet. 7-8 (quoting *Mellon Bank*, 475 U.S. at 1034 (O'Connor, J., dissenting from denial of certiorari)). But this hypothesis concerning Congress's intent in 1954 is not persuasive. The background of the congressional action was that deductions to cemetery companies consistently had been denied prior to 1954, not merely for contributions to family corporations, but for those to public cemeteries. The courts had held that such public cemetery companies were not "charitable" organizations within the meaning of the federal tax statutes. See, e.g., *Gund's*

for  
contributions

*Estate v. Commissioner*, 113 F.2d 61 (6th Cir. 1940), cert. denied, 311 U.S. 696 (1940); *Wilber Nat'l Bank v. Commissioner*, 17 B.T.A. 654 (1929); *Craig v. Commissioner*, *supra*. Congress did not take issue with that interpretation in 1954; it simply acted to change the results of those cases with respect to the income tax by enacting a special subsection to provide an income tax deduction for contributions to cemetery companies. It did not make an analogous change for the estate tax, and therefore, as every court of appeals that has considered the issue has concluded, the Code cannot reasonably be read to allow an estate tax deduction for a contribution made to a nonprofit cemetery company.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED  
*Solicitor General*

JULY 1988

**OPINION**

SUPREME COURT OF THE UNITED STATES

NEIL ROBERTSON, EXECUTOR OF THE WILL OF  
NORA HAND *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-1800. Decided October 11, 1988

The petition for a writ of certiorari is denied.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins,  
dissenting.

This case concerns the deductibility, under §§ 170 and 2055 of the Internal Revenue Code of 1954, 26 U. S. C. §§ 170 and 2055, of a testamentary disposition to a nonprofit cemetery, which enjoys tax-exempt status under § 501(c)(13) of the Code. The Solicitor General concedes that such a donation is deductible for federal income tax purposes, but he resists deductibility for federal estate tax purposes. Whether this distinction is legally sound is, I feel, an issue deserving plenary consideration by this Court.

I therefore dissent and would grant the petition for a writ of certiorari. I adhere to the reasons set forth by JUSTICE O'CONNOR in her opinion (which Justice Powell and I joined) dissenting from the denial of certiorari in *Mellon Bank, N. A. v. United States*, 475 U. S. 1032 (1986).